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No. 83-123

In the Supreme Court of the United States

OCTOBER TERM, 1983

NELSON JAMARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner abandoned any claim based on his waiver of a unanimous verdict when he failed to raise this issue in his brief or at oral argument before the court of appeals.

2. Whether the overhearing by a government agent of an attorney/client conversation in a public corridor required the granting of a mistrial.

3. Whether the evidence was sufficient to support petitioner's conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 702 F.2d 1315.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1983. A petition for rehearing (Pet. App. 32) was denied on May 26, 1983. The petition for a writ of certiorari was filed on July 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute, in violation of 21

U.S.C. 841(a). Pet. App. 1. Petitioner was sentenced to a 15-year term of imprisonment on the conspiracy count and a concurrent six-year term on the substantive count.

1. The facts underlying petitioner's conviction are fully set forth in the opinion of the court of appeals (Pet. App. 1-31). Briefly, in October 1980 both local and federal agencies received information that marijuana off-loading activities were taking place at the Cohen estate on Big Pine Key in the Florida Keys. A periodic surveillance was instituted and, on November 14, 1980, an agent observed two T-Crafts[1] in the vicinity of the Cohen estate. One of the boats entered a canal leading to the Cohen estate with only the pilot aboard and reemerged a few minutes later, loaded with six or seven people, heading toward the Gulf of Mexico. Additional agents were then summoned and a more intensive surveillance was instituted at the Cohen estate. Later that evening (about 2:00 a.m.) the agents heard a boat approach and stop near the Cohen estate. They then heard repeated "thuds," *i.e.*, sounds that were consistent with the unloading of marijuana bales. About 15 minutes later a second boat was observed approaching the Cohen estate. Shortly thereafter the thudding sounds started again. The agents conferred and at approximately 3:30 a.m., after blocking all exit routes, climbed over the chain link fence and entered the Cohen estate. *Id.* at 2-5.

As the agents approached the house they could smell the pungent aroma of marijuana. Three men exited from the garage and, after an unsuccessful attempt to flee, were arrested. The officers then entered the house, where seven people, including petitioner, were arrested. Additional arrests were made as follows: one person sitting outside the

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[1] A T-Craft is an open, 23-foot fishing boat with a center console. Pet. App. 2 n.1.

house, one person hiding under a truck, one person hiding in the bushes, one person attempting to flee into the woods, five persons in an attic crawl space above the garage, and four persons in a second boat loaded with 83 bales of marijuana. In all, 23 persons were arrested at the Cohen estate and 31,000 pounds of marijuana were seized. Pet. App. 5-8.

2. During jury deliberations, the foreman sent two notes to the court indicating that the jury was unable to reach a verdict as to several defendants (Tr. 3710, 3738).[2] In response, the trial court gave two modified *Allen* charges to the jury (Tr. 3721-3724, 3746-3749). Following the second *Allen* charge, however, the jury foreman informed the court that the jury was "hopelessly deadlocked" (Tr. 3749). At this point, defense counsel suggested that the court accept a waiver of the defendants' rights to a unanimous jury verdict rather than undertake a new trial (Tr. 3750-3753). After some initial reluctance (Tr. 3759), the trial court acceded to the defendants' request and instructed the defendants regarding the consequences of waiving their rights to a unanimous verdict (Tr. 3763-3764). Each defendant — including petitioner (Tr. 3765) — thereafter indicated in open court that he understood the nature of his right to a unanimous verdict and nevertheless agreed to waive it (Tr. 3765-3771). The jury subsequently returned an 11-1 verdict finding petitioner guilty as charged (Tr. 3777-3778).

ARGUMENT

1. Petitioner raises (Pet. 5-10) a previously unasserted claim that a unanimous verdict may not be waived in a federal criminal case and that his conviction by a non-unanimous verdict, following his knowing and voluntary waiver, must therefore be reversed. This claim does not merit review in the present circumstances.

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[2] "Tr." refers to the trial transcript.

The question whether a defendant may effectively waive a particular right at trial is distinct from the question whether the failure to raise the waiver issue on appeal constitutes a procedural default barring subsequent efforts to raise the issue. Here, petitioner did not argue the non-unanimous verdict issue in his brief before the court of appeals or at oral argument.[3] It was not until after oral argument, when petitioner filed a post-argument Notice of Supplemental Authority, that the instant claim was first raised.[4] The failure to raise an issue before the court of appeals in a timely manner constitutes abandonment of claims of both constitutional and non-constitutional dimensions. *Davis* v. *Maggio*, 706 F.2d 568 (5th Cir. 1983) (denial of continuance); *United States* v. *Bruscino*, 662 F.2d 450 (7th Cir. 1981) (Sixth Amendment speedy trial); *United States* v. *Gooch*, 603 F.2d 122 (10th Cir. 1979), (Fourth Amendment search and seizure); *United States* v. *Robertson*, 588 F.2d 575 (8th Cir. 1978), cert. denied, 441 U.S. 946 (1979) (severance); *United States* v. *Curtis*, 568 F.2d 643 (9th Cir. 1978) (admission of extrinsic offense evidence). Cf. *Sunal* v. *Large*, 332 U.S. 174 (1947). In view of petitioner's dilatory action, the court below was correct in concluding that he had abandoned the issue (Pet. App. 31 n.28).

Nor was the court of appeals obliged to notice the jury waiver issue as plain error under Fed. R. Crim. P. 52(b). To be sure, several courts of appeals have held on the basis of Fed. R. Crim. P. 31(a) and/or the Sixth Amendment that juror unanimity may not be waived in federal criminal

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[3]At oral argument, petitioner merely alluded to the non-unanimous verdict to bolster his claim that the evidence was insufficient to support the verdict. He did not, however, attack the validity of his waiver of his right to a unanimous jury verdict. Pet. App. 31 n.28.

[4]Petitioner also raised the non-unanimous verdict issue in his petition for rehearing.

trials. *United States* v. *Pachay*, 711 F.2d 488 (2d Cir. 1983); *United States* v. *Morris*, 612 F.2d 483 (10th Cir. 1979); *United States* v. *Lopez*, 581 F.2d 1338 (9th Cir. 1978); *United States* v. *Scalzitti*, 578 F.2d 507 (3d Cir. 1978). Indeed, that apparently is the rule in the Eleventh Circuit itself, which is bound by Fifth Circuit precedents. See *Sincox* v. *United States*, 571 F.2d 876 (5th Cir. 1978); *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977). We do not concede the correctness of these decisions ruling that a criminal defendant is incapacitated from waiving a unanimous verdict, which fail to give weight to the defendant's double jeopardy interest in having his guilt or innocence finally determined in a single trial. Nevertheless, we note that there is at present no conflict among the circuits requiring the attention of this Court with respect to the issue petitioner belatedly seeks to raise.

What is pertinent to the present petition is that, whatever might be the correct disposition of the underlying claim, the court of appeals' refusal to decide the issue sua sponte or to reconsider its judgment on petition for rehearing was entirely proper and worked no substantial injustice requiring review by this Court. That there is no unfairness is evident from the fact that defendants in state criminal proceedings may be validly convicted by non-unanimous verdicts even over their objection to such a practice. *Johnson* v. *Louisiana*, 406 U.S. 356 (1972); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972). While it is not clear whether Congress could adopt such verdicts for federal criminal trials, there is surely no unfairness in permitting knowing and intelligent waivers of the right, when other Sixth Amendment rights at least as fundamental and more definitively established, such as the right to assistance of counsel or the right to jury trial itself, are waivable.

2. Petitioner contends (Pet. 10-13) that the district court should have declared a mistrial because a government witness, while in a courthouse corrider, overheard a discussion of defense strategy and reported the substance of the conversation to the prosecutor. There is no merit to this claim.

Petitioner faults the court of appeals for focusing its analysis regarding the overheard defense strategy on the extent to which petitioner may have been prejudiced by the unintended disclosure of this information to the government. But such an analysis is clearly correct. In *United States* v. *Morrison*, 449 U.S. 361, 363-364 (1981), this Court held that any Sixth Amendment claim arising from a government intrusion into the relationship between defendant and counsel must be predicated upon some adverse consequence to the representation received by the defendant or the fairness of the trial proceeding. See also *Weatherford* v. *Bursey*, 429 U.S. 545, 548 (1977) (a realistic possibility of injury to the defendant and benefit to the prosecution must exist); *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). The district court's inquiry into the incident revealed that the overheard conversation dealt with whether the defense should seek a mistrial on the basis of alleged misconduct by the prosecutor earlier in the trial, and, as the district court found, the overheard discussion concerned subjects that were well known to anyone trained in the law of criminal procedure (Tr. 1835). Under such circumstances, the prosecution's knowledge of the conversation could not have prejudiced petitioner, and the court of appeals properly upheld the district court's refusal to grant a mistrial. *United States* v. *Morrison, supra*, 449 U.S. at 363-364; *Weatherford* v. *Bursey, supra*, 429 U.S. at 548.

Petitioner cites *Black* v. *United States*, 385 U.S. 26 (1966), for the proposition that automatic reversal is mandated upon any showing of an intrusion into the defendant's attorney/client relationship. But petitioner's case is entirely unlike *Black*. As noted by the court of appeals, the conversation in question took place in a public corridor and was sufficiently loud to be heard by any passer-by (Pet. App. 22). Under such circumstances, counsel cannot reasonably expect to maintain the confidentiality of an attorney/client discussion. See *United States* v. *Melvin*, 650 F.2d 641, 645 (5th Cir. 1981) ("disclosures made in the presence of third parties may not be intended or reasonably expected to remain confidential"). In *Black* the violation of an expectation of privacy was clear — the attorney/client conversation was surreptitiously overheard through the use of a microphone secreted in the defendant's hotel room. 385 U.S. at 29.

In any event, even aside from the vast disparity in the propriety of the means of overhearing, petitioner's case is also clearly distinct from *Black* with respect to the timing of the disclosure of the intrusion into the defense camp. In *Black* the disclosure literally came at the eleventh hour —after this Court had initially denied certiorari but before the petitioner had applied for rehearing. 385 U.S. at 27. In that rather extreme situation, this Court deemed post-trial review to be inadequate and ordered a new trial. 385 U.S. at 29. In petitioner's case, however, the disclosure came at trial shortly after the conversation was overheard. The trial court was therefore fully positioned to evaluate the prejudice, if any, to petitioner and to monitor the trial proceedings closely for any sign of prejudice (Tr. 1837-1838). No prejudice was found. Requiring a mistrial under these circumstances would be directly contrary to the rejection of such a per se rule in *United States* v. *Morrison, supra*, and

petitioner has provided no grounds for conducting a reappraisal of so recent a decision of this Court. Cf. *Black* v. *United States, supra,* 385 U.S. at 31 (Harlan, J., dissenting) (government intrusion upon defendant's attorney/client relationship should not result in automatic reversal).

3. Petitioner finally contends (Pet. 13-16) that the evidence was insufficient to support his conviction. There is no merit to this claim.

Petitioner and seven other co-defendants were arrested inside the living room of the Cohen house when government agents interrupted the marijuana off-loading operation taking place around the house. It was 3:30 in the morning, the air was thick with the heavy odor of marijuana, the thudding sound of the bales of marijuana being unloaded was unmistakable, and two nearby trucks had been partially loaded with marijuana. The jury was not required to put on blinders to the all-too-familiar realities of the operation at the Cohen estate simply because there was no proof that marijuana was actually located in the room where petitioner was arrested. *United States* v. *Soto,* 591 F.2d 1091, 1102 (5th Cir. 1979); *United States* v. *Alvarez,* 548 F.2d 542, 544 (5th Cir. 1977). The court of appeals carefully reviewed the evidence (Pet. App. 23-28) and found it sufficient. Petitioner has failed to provide any rationale that would warrant further review by this Court of a factbound claim rejected by the court of appeals. See *Burks* v. *United States,* 437 U.S. 1, 17 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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